KLINIK ALAM MEDIC SDN BHD

v.

TANG MING HAO

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[JUDICIAL REVIEW APPLICATION NO: R1-25-128-2002]
12 JULY 2005

CIVIL PROCEDURE: *Prerogative Order - Certiorari - Award of Industrial Court - Error of law and/or fact - Judicial review*

LABOUR LAW: *Award - Backwages and compensation subject to EPF - Must company contribute to EPF*

This was an application by the applicant seeking a *certiorari* order towards the Industrial Court Award No. 794 of 2002 dated the 25 September 2002 which found that the respondent had been constructively dismissed by the applicant and awarding backwages plus compensation *in lieu* of reinstatement to the respondent ("said award"). The sole issue that arose for consideration before this court was whether the learned chairman of the Industrial Court had erred in fact and in law in arriving at the decision in the said award.

Held (Dismissing application and upholding the said award):

[1] The learned chairman of the Industrial Court had found that the claimant had left her employment due to the change in her working hours which constituted a fundamental breach of the essential terms of the respondent's contract. Hence according to the learned chairman, the respondent was right to consider herself as constructively dismissed. (p. 310 d-e)

[2] I could not find any error on the part of the learned chairman in arriving at the said decision. She had taken into consideration all the evidence adduced by the parties and made the necessary findings. The learned chairman's findings were findings of fact which this court should be slow in interfering with, bearing in mind that this is not an appeal but a judicial review. Hence I find no error on the part of the learned chairman in holding that the respondent was constructively dismissed by the applicant. (p. 310 e-f)

[3] The learned chairman erred in ordering that the backwages and compensation *in lieu* of reinstatement awarded to the respondent was subject to Employee Provident Fund contributions by the applicant and that part of the award is quashed. (p. 310 g)

For the applicant - T M Varughese; M/s TM Varughese & Co
For the respondent - CL Chin; M/s CL Chin & Assocs

Reported by Sharmini Pillai

JUDGMENT

Raus Sharif J:
This is an application by the applicant for an order of *certiorari* seeking to quash the Industrial Court Award No 794 of 2002 dated 25 September 2002. The Industrial Court found that the respondent was constructively dismissed by the applicant on 19 June 1997. Accordingly, the Industrial Court awarded backwages in the sum of RM5,500 per month for a period of eight months commencing from 1 June 1997 until 31 January 1998. The Industrial Court also awarded compensation *in lieu* of reinstatement in the sum of RM5,500 per year for four years. The applicant was ordered to pay the respondent within one month subject to income tax deductions and employee provident fund contributions.

The applicant is a company which managed a number of clinics. The respondent is a medical doctor and was employed by the applicant on 1 March 1993 by a letter of appointment dated 20 February 1993. It was stated in the letter of appointment that the respondent had to work forty-eight hours a week and was entitled to one day off. She was also entitled for twelve days leave per year and in addition to eight public holidays of her choice. On 1 March 1994, her basic salary and allowances were increased by a second letter of appointment. But the terms on the working hours and leave were unchanged. Again, on 1 March 1996 her basic salary and allowance were further increased. In addition, she was paid a percentage of charges for house calls and elective procedures, and a fix sum for pep smears. Again, the terms on the working hours and leave remained unchanged.

On 8 April 1997 by a letter dated 8 March 1997, the applicant dismissed the respondent. The respondent referred her dismissal to the Industrial Relations Department. She was reinstated by the applicant on 30 April 1997. Another letter of appointment was issued by the applicant on the same day. There were two new terms. Firstly, the respondent had to work three evenings and three day shifts per week and secondly, she was required to work at the branch clinic as and when required.

The respondent resumed working with the applicant on 2 May 1997. She then complained to the applicant that she had not been paid her wages from 8 April 1997 until 30 April 1997, her allowance for April and May 1997 and her bonus for 1996. By a letter dated 7 June 1997, she considered herself as not having been reinstated and did not report to work on the said date. The applicant sent a warning letter dated 7 June 1997, to the respondent for failure to report to work on 7 June 1997.

The respondent reacted in a letter dated 11 June 1997 giving her reason for not reporting for work on 7 June 1997 which was the failure of the applicant to pay her salary and allowance for April 1997 and her bonus for 1996. She also objected to her new working hours from 2p.m. to 10p.m. on Thursdays and Fridays and 8a.m. to 4p.m. on Saturdays which would be implemented on 16 June 1997. She stated in her letter that she wanted to revert to her original working hours from 8a.m. to 5p.m. on Mondays to Fridays and from 8a.m. to 1p.m. on Saturdays. Subsequently by a letter dated 19 June 1997, the respondent claimed that she had been constructively dismissed.

The learned chairman of the Industrial Court found that the claimant left her employment on 19 June 1997 because of the change of her working hours. To the learned chairman, the change in the working hours of the respondent constituted a fundamental breach of the essential terms of the respondent's contract. Hence, according to the learned chairman the respondent was right to consider herself constructively dismissed on 19 June 1997.

I could not find any error on the part of the learned chairman in arriving at the said decision. She has taken into consideration all the evidence adduced by the parties and made the necessary findings. To me, the learned chairman's findings are findings of facts which this court should be slow in interfering, bearing in mind this is not an appeal but a judicial review. Hence, I find there is no error on the part of the learned chairman in holding that the respondent was constructively dismissed by the applicant. Accordingly, the applicant's application is dismissed. Nevertheless, I am of the view that the learned chairman was in error to order that the backwages and compensation *in lieu* of reinstatement awarded to the respondent attract employees provident fund's contribution by the applicant. As such, that part of the award is quashed.

In the circumstances of this case, I made no order as to costs.